Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1212

FRANCESCO SCIBELLI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Francesco Scibelli respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on January 31, 1977.

Opinion Below

The opinion of the Court of Appeals for the First Circuit has not yet been published in the official reports. A copy of the opinion is attached hereto as Appendix A. (App. 9).

Jurisdiction

The judgment sought to be reviewed was entered by the United States Court of Appeals for the First Circuit on January 31, 1977. No petition for rehearing was filed because of the limitation of such petitions to new matters under Local Rule 15 of the First Circuit.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

Question Presented for Review

1. Whether or not the Government failed to comply with the relevant provisions of 18 U.S.C. § 2518(1)(c), requiring that the affidavits, applications and orders used to secure permission for electronic surveillances set forth with sufficient particularity that investigative procedure, other than electronic surveillances, were tried and failed or reasonably appeared unlikely to succeed?

Statutes Involved

18 U.S.C. §§ 2, 371, 1955 and 2518 are involved. The text of those sections is attached hereto as Appendix B. (App. 24).

Statement of the Case

The petitioner was charged and convicted with others of operating an illegal gambling business and with conspiracy to commit the substantive offense in violation of 18 U.S.C. §§ 1955, 2, and 371. In the course of a six-month investigation into gambling operations in western Massachusetts, the F.B.I. derived evidence against the petitioner (and the other co-defendants) from three periods of electronic surveillance. The petitioner's pre-trial motion to suppress this evidence was denied after an evidentiary hearing. All defendants, including the petitioner, waived trial by jury and agreed to be tried by the Court on the basis of stipulated facts and opinions. The petitioner, as well as the other defendants, specifically reserved "their challenge to the validity of the court orders herein discussed, their challenge to the manner in which the said court orders were implemented, or any other matter heretofore raised on motion." (App. 11).

The three affidavits in support of the Government's applications for wiretap orders contained the following conclusionary language:

> "normal investigative procedures have failed to gather evidence necessary to sustain prosecution for violations of these offenses and appear unlikely to succeed if tried further." (App. 12)

However, during cross-examination, F.B.I. Special Agent Ringgold, who was in charge of the investigation, admitted that contrary to the allegations contained in the affidavits, he did not consider discussing with his informants the possibility of their being given immunity, of their being placed in protective custody, or of their being relocated with a new identity in return for testifying. (App. 18)

The petitioner's appeal to the United States Court of Appeals for the First Circuit concerned itself with the sole issue of whether the Trial Court erred in denying the petitioner's motion to suppress the evidence acquired during the three electronic surveillances for the reason that the Government failed to comply with 18 U.S.C. § 2518(1)(c), which requires that an application for a wiretap order include "a full and complete statement as to whether or

not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Reasons for Granting the Writ

A. The Opinion of the Court of Appeals For the First Circuit Is Contrary to the Intent of Congress in Passing 18 U.S.C. § 2518(1)(c) and (3)(c).

18 U.S.C. § 2518(1)(c) and 2518(3)(c) require an application for authority to make any wire interception to state, and the judge authorizing any such wire interception to find, that "normal investigative procedures" have either failed or appeal unlikely to succeed. In *United States* v. *Kahn*, 415 U.S. 143 (1974) the Court makes reference at page 151 to Senate Report No. 1097 of the 90th Congress, which contains the legislative history of the aforesaid provisions and explains the Congressional intent behind them.

With respect to § 2518(1)(c) the Senate Report indicated that

> "[s]ubparagraph (c) requires a full and complete statement as to whether or not normal investigative procedures have been tried and have failed or why these are unlikely to succeed if tried, or to be too dangerous. This requirement is patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wiretap by the Home Secretary. Compare *Report of the Committee of Councillors Appointed to Inquire into the Interception of Communication*, par. 64 (1957); *Read* v. *Case*, 4 Conn. 166 (1822). The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aural surveillance techniques

> by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration or conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. See *Giancana* v. *United States*, 353 F.2d 921 (7th) *certiorari denied*, 86 S. Ct. 437, 382 U.S. 959 (1965); *New York* v. *Saperstein*, 2 N.Y. 2d 210, 140 N.E. 2d 252 (1957). What the provision envisions is that the showing be tested in a practical and common-sense fashion. Compare *United States* v. *Ventresca*, 85 S. Ct. 741, 380 U.S. 102 (1965)."
>
> S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News, 2190.

Section 2518(3) (c) authorizes a Federal judge to enter an ex parte order authorizing or approving the interception of wire or oral communications. What the judge must determine before he can issue an order, based on the facts submitted to him, is specified in subparagraphs (a) through (d). The legislative history then makes the following observation with respect to these requirements:

> "Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity (*Berger* v. *New York*, 87 S. Ct. 1873, 388 U.S. 41, 58-60 (1967); *Katz* v. *United States*, 88 S. Ct. 507, 389 U.S. 347, 355-356 (1967)."
> S. Rep. No. 1079, 90th Cong., 2d Sess., 101, U.S. Code Cong. & Admin. News, 1968, p. 2112 at 2191.

It is plain that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was the studied reaction of Con-

gress to an awakening realization that our form of government will not permit an intrusion by electronic devices into the privacy of our citizens without the most careful judicial scrutiny and supervision. Although recognizing that the sophistication of modern-day crime and the employment by those who seek to break the law of telephonic communication requires that law enforcement be given an equally effective tool, with which to uncover such crime, Congress nonetheless displayed its concern with potential abuse by insisting that every application for electronic surveillance contain:

> "A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."
> 18 U.S.C. 2518(1) (c) (1968),

and that a Court order permitting electronic surveillance may be authorized only if a United States District Court Judge or a United States Court of Appeals Judge finds that

> "Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."
> 18 U.S.C. 2518(3) (c) (1968).

In the opinion below, the Court of Appeals, quoting *United States* v. *Kahn, supra* and *United States* v. *Giordano,* 416 U.S. 506 (1974), observed that " ' the purpose of the statutory language is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime'," . . . "and that the Section safeguards against wiretapping 'procedures [being] routinely employed as the initial step in the criminal investigation'."
(App. 16)

In footnote 5 of its opinion the Court below dismissed the petitioner's contention that Agent Ringgold's affidavits were insufficient because he had failed to discuss immunity, failed to discuss the possibility of protective custody, and failed to discuss relocation with his informants, stating that "to limit the Government's investigation by requiring it to use every available incentive to induce informants to testify prior to seeking a wiretap order would constitute unwarranted Court interference with legitimate investigative discretion, and would effectively foreclose electronic surveillance until every other imaginable method of investigation has been successfully attempted." (App. 18).

Contrary to the opinion of the Court of Appeals, what Sections 2518(1) (c) and (3) (c) require is not an actual attempt at every other possible investigative technique, but rather a detailed statement as to why certain normal investigative techniques are inappropriate and impossible for the particular matter under investigation. Only then can the judge before whom the application is brought make an independent and considered judgment that a wiretap is necessary, and not merely the path of least resistance for the Government.

B. There Appears to Be a Wide Divergence of Opinion Among the Several Circuits of Appeal Concerning the Extent to Which the Government Must Aver Exhaustion of Normal Investigative Techniques and the Extent to Which It Actually Must Pursue Alternative Means to Electronic Surveillance.

In *United States* v. *Kalustian,* 529 F.2d 585 (9th Cir. 1976), the Court of Appeals for the Ninth Circuit established what probably represents the most rigid standards that must be followed in order that an affidavit pass muster, requiring that

"the Government must (1) inform him of every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case."

At the opposite end of the spectrum is the more "pragmatic" approach represented by the decisions of the Third Circuit in *United States* v. *Armosida,* 515 F.2d 29 (3rd Cir. 1975) cert. denied 423 U.S. 858 (1976); and more recently in *United States* v. *Vento,* 533 F.2d 838 (3rd Cir. 1976.)

To secure the right of the individual citizen to be free from unwarranted and unjustified wiretap intrusions is the obvious purpose of 18 U.S.C. 2518. A determination by this Court as to what particulars must be presented to a judge before a wiretap order is made is necessary to ensure uniformity in the application of 18 U.S.C. 2518(1) (c) and (3) (c) among the several Circuits.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted: to determine whether the opinion of the Court of Appeals for the First Circuit failed to take into account the intent of Congress in passing 18 U.S.C. 2518(1) (c) and (3) (c); and to resolve inconsistencies between the several Circuit Courts of Appeals.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 76-1214

UNITED STATES OF AMERICA,
APPELLEE,
v.
FRANCESCO SCIBELLI,
DEFENDANT, APPELLANT.

No. 76-1215

UNITED STATES OF AMERICA,
APPELLEE,
v.
ANDREW TORINO,
DEFENDANT, APPELLANT.

No. 76-1216

UNITED STATES OF AMERICA,
APPELLEE,
v.
DANIEL SACCO,
DEFENDANT, APPELLANT.

No. 76-1217

UNITED STATES OF AMERICA,
APPELLEE,
v.
ADOLFO BRUNO,
DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. FRANK H. FREEDMAN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
MCENTEE AND CAMPBELL, *Circuit Judges*.

Joseph J. Balliro for Francesco Scibelli, appellant.
Jay M. Forgotson for Andrew Torino, appellant.
James M. Pool, by appointment of the Court, for Daniel Sacco, appellant.
John E. Barrett, with whom *Jerry E. Benezra* was on brief, for Adolfo Bruno, appellant.
Edward L. Donnellan, with whom *Keyes, Donnellan and Danaher* was on brief, for Lawrence Stone, appellant.
Robert H. Abrams, by appointment of the Court, for Joseph Albano, appellant.
Michael O. Jennings, by appointment of the Court, for Rocco Albano, appellant in case no. 76-1221, and for Anthony Maloni in case no. 76-1220.
George F. Kelly, Attorney, United States Department of Justice, with whom *James N. Gabriel*, United States Attorney, and *Gerald E. McDowell*, Attorney, United States Department of Justice, were on brief, for appellee.

January 31, 1977

CAMPBELL, *Circuit Judge*. The two-count indictment in this case charged appellants, eight in number, and two others, with operating an illegal gambling business and with conspiracy to commit the substantive offense in violation of 18 U.S.C. §§ 1955[1] and 2.[2] The indictment arose out of a six-month investigation by the FBI and the Massachusetts State Police in 1974 into gambling operations in western Massachusetts. After denial of pre-trial defense motions to suppress evidence derived from three periods

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[1] Section 1955 provides in pertinent part:
"Whoever conducts, finances, manages, supervises, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both."

[2] Section 2, entitled "Principals", provides:
"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

of electronic surveillance, defendants waived jury trial, and the Government, counsel for the defendants and the defendants themselves agreed to a "Stipulation" of "facts and opinions" which "together with such physical and testimonial evidence as may be offered and admitted into evidence shall constitute the evidence upon which the issues of fact and law in this case are to be determined, subject however, to those objections as are enumerated herein." Defendants specifically reserved "their challenge to the validity of the court orders herein discussed, their challenge to the manner in which the said court orders were implemented, or any other matter heretofore raised on motion." Based on the Stipulation, the district court found all appellants guilty as charged on both counts. Apart from the Stipulation, the record in this case contains the Government's three applications for wiretap orders, the defense motions to suppress, and the transcript of the pre-trial hearing on those motions.

The arguments upon appeal may be conveniently divided into two groups. Six[3] of the eight appellants argue that the district court erred in denying defense motions to suppress the evidence derived from the Government's electronic surveillance. This argument is based on the contention that the Government failed to comply with 18 U.S.C. § 2518(1)(c), which requires the Government in making application for a wiretap order to include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." The remaining two appellants[4] argue solely that the evidence in the Stipulation implicating them was insufficient to convict.

---

[3] Francesco Scibelli, Andrew Torino, Daniel Sacco, Joseph Albano, Anthony Maloni, and Rocco Albano.

[4] Adolfo Bruno and Lawrence Stone.

I

A brief review of the facts surrounding the three orders of the district court approving electronic surveillance will help to clarify our discussions of appellants' argument that the Government did not comply with 18 U.S.C. § 2518 (1)(c). FBI Special Agent Ringgold testified at the hearing on the motions to suppress that he began investigating gambling operations in western Massachusetts in June, 1974. He said that he first suggested to his supervisors the need for electronic surveillance four to six weeks later. On October 15, 1974, the district court issued an order, E.B.D. 74-224, on application from the Government, directing interception of wire communications on two telephone numbers in western Massachusetts for a period of twenty-one days. The Government's application was supported by a 78-page affidavit of Agent Ringgold. In pertinent part, the affidavit stated in conclusory terms that "Normal investigative procedures have failed to gather evidence necessary to sustain prosecution for violations of these offenses and appear unlikely to succeed if tried further." Agent Ringgold stated later in the affidavit more specifically why normal investigative procedures appeared unlikely to succeed.

> "While execution of search warrants involving individuals and locations relevant to this investigation may well produce gambling related paraphernalia, it is my experience that gambling records are often sketchy in nature, often contain code names, and rarely establish a provable connection between all the participants in the illegal gambling business. None of the informants cited above is willing to testify as to information they have imparted for fear of their personal safety. . . . [W]ith respect to [A], immunity has been tried before the Grand Jury currently investigating organized gambling in the Western Massachusetts area[,] . . . [and his] testimony is not likely to result in the indictment of any other gamblers. . . . [I]t is apparent from the conduct of the subjects that meaningful admissions or evidence of criminal associations and the roles played by the various members of this organized gambling business are not likely to be secured by a continuation of this form of investigation. In addition, the repeated presence of . . . undercover individuals may well reveal the fact that the subjects are under law enforcement scrutiny. For example, it is apparent that the subjects continually utilize the table in the right rear area of the lounge on a consistent basis in order to hold subdued conversation. . . . [T] oll record information, while valuable in providing circumstantial proof that certain known bookmakers and bettors are in regular telephone contact, they do [sic] not establish the actual identify of the participants[,] . . . provide any evidence whatsoever as to the contents of the conversation[,] . . . [or] reveal contact . . . among bookmakers and bettors residing within the same dialing area."

The district court issued a second wiretap order, E.B.D. 74-275, on November 14, 1974, directing interception of wiretap communications on four new numbers in western Massachusetts for a twenty-one day period. The supporting affidavit, which incorporated by reference the first affidavit, again represented that "Normal investigative procedures have failed to gather evidence sufficient to sustain prosecution against all of the individuals believed to be committing these offenses", and went on to detail the need for electronic surveillance. Agent Ringgold explained that surveillance by means of a listening device planted in one location was "complicated by extraneous noise[,] . . . caused by a rather loud band . . . ."; he alleged facts tending to show "that the subjects of this

investigation are extremely sensitive to what they consider to be law enforcement scrutiny"; and he stated that "[t]he informants cited in connection with this investigation continue to be unwilling to testify."

The third order for electronic surveillance, E.B.D. 74-295, directed interception of wire communications on two new numbers and was issued by the district court on December 10, 1974, for a period of twenty days. The supporting affidavit repeated that "Normal investigatory procedures have failed to gather evidence sufficient to sustain prosecution against all of the individuals believed to be committing these offenses." Agent Ringgold came to this conclusion though he was "familiar with all the contents of all the tape recordings and contemporaneous log entries resulting from [the prior] interceptions . . . ." and had been informed by the other state and federal investigators "as to any record checks, physical surveillances or other information which they have acquired from their direct participation in this investigation." The affidavit also stated again that "[i]nformants knowledgeable of this operation continue to be unwilling to testify for fear of their personal safety."

Appellants claim that each of the Government's applications failed to satisfy the requirement of 18 U.S.C. § 2518(1)(c). That section requires that all applications include

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous".

Section 2518(3)(c) of Title 18 attempts to assure that this requirement will be satisfied by imposing upon the district judge reviewing the application an independent obligation to

> "determin[e] on the basis of the facts submitted by the applicant that . . . normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous".

The judge's determination is, of course, reviewable on appeal, by which time the wiretap will normally have been authorized, the evidence gathered, and a conviction obtained. An appeals court's role is not to make a *de novo* determination of sufficiency as if it were a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made. *United States* v. *DiMuro,* 540 F.2d 503, 510-11 (1st Cir. 1976) *cert. denied,* 45 U.S.L.W. 3463 (U.S., Jan. 10, 1977). *In re Dunn,* 507 F.2d 195, 197 (1st Cir. 1974); *accord, United States* v. *Kalustian,* 529 F.2d 585, 589 (9th Cir. 1975); *United States* v. *Kahn,* 471 F.2d 191, 200-01 (7th Cir. 1972) (Stevens, J., concurring in part and dissenting in part), *rev'd on other grounds,* 415 U.S. 143 (1974). As in reviewing the validity of a search warrant, the inquiry is whether the affidavit provided a sufficient basis for a finding of probable cause. *See United States* v. *Falcone,* 505 F.2d 478, 481 (3d Cir. 1974), *cert. denied,* 420 U.S. 955 (1975).

And in determining the sufficiency of the application a reviewing court must test it in a practical and commonsense manner. The legislative history makes clear that section 2518(1)(c) is not designed to force the Government to have exhausted all "other investigative procedures".

> "The judgment [of the district judge] would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or in-

terrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. What the provision envisions is that the showing be tested in a practical and commonsense fashion."

S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News 2190 (citations omitted). The Supreme Court has observed that the purpose of the statutory language "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime", *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12 (1974), and that the section safeguards against wiretapping "procedures [being] routinely employed as the initial step in criminal investigation." *United States* v. *Giordano*, 416 U.S. 505, 515 (1974). The fifth circuit has said,

> "[T]he purpose of the requirement in section 2518 (1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques."

United States v. *Pacheco*, 489 F.2d 554, 565 (1974), *cert. denied*, 421 U.S. 909 (1975). *Accord, United States* v. *Vento*, 533 F.2d 838, 849 (3d Cir. 1976); *United States* v. *Smith*, 519 F.2d 516, 518 (9th Cir. 1975); *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975).

Viewing the applications in light of these considerations, we find no error in the district court's refusal to suppress the wiretap evidence. Appellants contend that the affidavits of Agent Ringgold supporting the applications for the wiretap orders failed to give the necessary "full and complete

statement" as they contain only bare, conclusory statements based on the affiant's experience. *See United States* v. *DiMuro, supra.* It is true that in his initial affidavit Agent Ringgold referred to his investigatory experience, stating that execution of a search warrant would likely be unavailing, that toll record information would not provide the hard information necessary to the Government's case, and that immunized gamblers "are extremely reluctant and unwilling to implicate other bookmaking associates . . . ." If this were all the affidavit had to offer in support of its conclusion that "normal investigative procedures . . . reasonably appear to be unlikely to succeed if tried . . . .", the question whether the affidavit met the statutory requirement would be closer; in *DiMuro* we expressed some uneasiness with such statements alone, fearing they might amount to little more than "mere conclusions based solely on past experience that gambling conspiracies are 'tough to crack' . . . ." *Id.* On the other hand, we earlier said, and we adhere to this view, that in deciding whether an application for a wiretap satisfied the statutory requirement, the court may "consider the nature of the alleged crimes." *In re Dunn, supra*, 507 F.2d at 197. A large-scale gambling conspiracy may by its structure and modus operandi give rise to a reasonable inference that "other investigative procedures . . . reasonably appear to be unlikely to succeed if tried."

But we need not decide whether Agent Ringgold's surmises based on investigatory experience would have been enough, since Agent Ringgold's affidavit in E.B.D. 74-224 did not stop there; the agent went on to specify the problems with using normal investigative procedures in that investigation. Ringgold stated that none of the several informants was willing to testify and observed that the one informant who had testified with immunity was unable or unwilling to give information to the grand jury that

would lead to the indictment of other individuals. The affidavit also explained why continued physical surveillance would provide only cumulative evidence. The "conduct" of the subjects under investigation, according to Ringgold, led him to believe that normal surveillance techniques would not produce "meaningful admissions or evidence of criminal associations and the roles played by various members of this organized gambling business . . . ." This conclusion was tied specifically to the physical layout of the premises where most of the personal transactions between the subjects took place. Testing the affidavit "in a practical and commonsense fashion", we have no doubt that it was adequately specific in explaining why continued physical surveillance would not lead to substantial new evidence. Under the first application, therefore, the district court was fully justified in concluding that "normal investigative procedures . . . reasonably appear to be unlikely to succeed . . . ."[5]

[5] Appellant Scibelli argues that Agent Ringgold's testimony at the suppression hearing to the effect that he did not consider discussing with his informants the possibility of being given immunity, being placed in protective custody, or being related with a new identity in return for testifying because of his experience that all informants will resist testifying in gambling cases underscores the Government's failure to consider other investigative procedures prior to applying for the first wiretap order. We disagree. Agent Ringgold stated at the hearing, as he swore in the affidavit, that he had discussed with each informant, the possibility of testifying, and each indicated an unwillingness to do so. From their responses, Agent Ringgold was entitled to conclude that it would be futile to pursue with them the possibility of immunity, protective custody and relocation. To limit the Government's investigation by requiring it to use every available incentive to induce informants to testify prior to seeking a wiretap order would "constitute unwarranted court interference with legitimate investigative discretion", *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975), and would effectively "foreclose electronic surveillance until every other imaginable method of investigation has been successfully attempted . . . .", *United States* v. *Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975). The Government, moreover, would have been justified in concluding that the forced testimony of informants or individual bettors might not have been sufficient to reveal the scope of this "large-scale" betting operation. *See United States* v. *Vento*, 533 F.2d 838, 849-50 (3d Cir. 1976). Agent Ringgold's statement in the first affidavit that according to the United States Attorney directing the grand jury's investigation into the gambling operation, the testimony of one informant before the grand jury was "not likely to result in the indictment of any other gamblers in the Western Massachusetts area" supports the Government's decision not to rely solely on such testimony to further its investigation.

[6] Appellants Scibelli and Torino included in their statements of the issues two additional challenges to the sufficiency of the wiretap applications, but did not develop these issues in their briefs. Neither has merit. Their claim that by failing to disclose in his affidavit a payment of $50 to an informer, Agent Ringgold misrepresented an essential fact plaintiff falls short of affording a ground for overturning the wiretap order: the fact of the payment

The two subsequent applications had also, of course, to meet the requirement of section 2518(1)(c), but incorporation of the affidavit in E.B.D. 74-224 in the latter two applications went a long way towards meeting the requirement; and each of the two subsequent applications alleges sufficient additional facts showing the continuing failure of normal investigative procedures to satisfy the standard of section 2518(1)(c). The affidavit in E.B.D. 74-275 revealed the unsuccesful attempt to gather evidence by means of a listening device, indicated that several targets of the investigation were becoming suspicious of law enforcement scrutiny, and reiterated that the informants remained unwilling to testify. In the affidavit supporting the third application, in addition to incorporating his previous two affidavits and repeating that the informants were unwilling to testify, Agent Ringgold stated that he was familiar with the results of the two periods of surveillance and that he had been informed of information acquired by other investigators, and he still concluded that electronic surveillance was necessary. Considering together all factors mentioned in each affidavit, each was sufficient for the district court to find it met the requirement of section 2518(1)(c).[6]

II

Appellants Bruno and Stone attack their convictions solely on the ground that the evidence against them contained in the Stipulation was insufficient to convict.

The evidence against Bruno contained in the Stipulation included the following:

> "Adolfo Bruno — Interceptions over [one of the numbers wiretapped] show defendant Adolfo Bruno discussing the sports line with defendant Daniel Sacco and indicated that he was formerly 'using' a particular game at '12 1/2' but was now using it at '13'. Defendant Daniel Sacco also requested that defendant Bruno provide him with ten sports line sheets that had been filled in with line information."

There was also evidence from phone toll records of 51 phone calls over a three-month period made from two phones to which Bruno had access, 29 of which calls were placed from his residence phone, to the J.K. Sports Journal, which "provided a recording of up-to-date sports results." The Stipulation included an "Early Analysis" by FBI Agent Harker, who the parties agreed was "qualified to render an opinion concerning bookmaking based upon the physical evidence, tape recordings, and stipulations . . . ." He described the term "line" as a "figure which is picked [by a bookmaker] which, it is believed, will get people to bet on both sides of the game. . . . [A]s the betting starts out at the beginning of the week generally all bookmakers in all parts of the country start with the same line information. Then the bookmaker is free to alter that line as he sees fit." Agent Harker concluded

had little obvious bearing on the statutory requirements for obtaining a wiretap, and Agent Ringgold plausibly testified that he did not volunteer the information in his affidavit because he thought it to be irrelevant. *Compare United States* v. *Belculfine*, 508 F.2d 58 (1st Cir. 1974). Their second claim, that the application did not adequately state the particular offenses under investigation, is simply incorrect.

that Bruno functioned as a "bookmake[r] who utilized the office as a source of line information and as an actual or potential outlet for lay-off wagers." He also gave his opinion that Bruno "provided a valuable service to the gambling business of Daniel Sacco by providing him with copies of line sheets which were apparently being used by him and other bookmakers."

Considered "in the light most favorable to the government, together with all legitimate inferences to be drawn therefrom", *United States* v. *Doran*, 483 F.2d 369, 372 (1st Cir. 1973), *cert. denied*, 416 U.S. 906 (1974), the evidence against Bruno was sufficient to convict. Evidence of the discussion between Bruno and Sacco indicating that Bruno had decided to "use" a higher "line" on "a particular game" is convincing proof that Bruno was a bookmaker, and this sharing of "line" information suggests his connection with the larger gambling operation. The request from Sacco for sports line sheets is additional evidence of Bruno's participation in the overall operation. The evidence in the Stipulation, therefore, is adequate to prove the Government's case. "The exchange of line and other gambling information are necessary and useful functions in a gambling enterprise and persons who carry out such functions have been held to be engaged in 'an illegal gambling business.' " *United States* v. *DiMuro, supra*, 540 F.2d at 508, and cases cited.[7]

[7] Bruno argues that Agent Harker's opinion that Bruno "utilized the office as a source of line information and as an actual or potential outlet for lay-off wagers" and his conclusion that Bruno "provided a valuable service to the gambling business of Daniel Sacco by providing him with copies of line sheets which were apparently being used by him and other bookmakers" were unsupported by the evidence in the Stipulation and therefore inadmissible. *See Gray* v. *Shell Oil Co.*, 469 F.2d 742, 750 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). Bruno seems correct that the evidence does not afford a factual basis for the expert's opinion that he "utilized the office" in his bookmaking transactions. On the other hand, Agent Harker's conclusion that Bruno aided

The evidence against appellant Stone is as follows:

> "Lawrence Stone—On one interception dated October 22, 1974 . . . defendant Stone was revealed placing horse wagers with defendant Daniel Sacco.[8] On this one occasion, defendant Stone and defendant Sacco were discussing defendant Francesco Scibelli and the betting habits of an individual referred to as 'Carm Mazbo' (PH). On one interception . . . defendant Stone was revealed calling co-conspirator Andrew Pradella and informing Pradella as to the betting preferences of someone referred to as 'that guy' on two particular professional football games on this one occasion. Interception . . . revealed a conversation between defendant Maloni and co-conspirator Florian referring to defendant Stone as someone who had accepted horse wagers from a betting customer of Florian and Maloni."

There was also evidence that Stone was present at the "office" on two occasions. With respect to Stone, the expert stated that he "operated as a bookmaker associated with defendant Francesco Scibelli and acted on behalf of defendant Scibelli as a conduit of sports wagering information to Pradella for the purpose of influencing Pradella's

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Sacco's gambling business by providing him with copies of line sheets is a fair inference from the stipulated evidence. The evidence would be adequate, in any event, without reference to Agent Harker's opinion on these matters.

[8] Included in the Stipulation is Stone's statement that he does "not agree that he was a participant in this conversation . . . ." Countering this assertion is Agent Ringgold's statement in the Stipulation that "based upon all his familiarity with Stone's voice and from listening to the [voice] exemplar [given by Stone] Ringgold identifies Stone as a participant in the telephone conversation with Defendant Sacco occurring on October 22, 1974 . . . ." Considering the evidence most favorably to the Government, we must conclude that the district court credited Agent Ringgold's identification of Stone's voice and found that Stone participated in this conversation.

operation of the 'office'." Commenting specifically on the phone call between Stone and Pradella, Agent Harker stated his opinion that Stone placed this call 'at the request of defendant Scibelli, . . . and informed [Pradella] as to two teams which someone referred to as 'the guy' chose as most likely to beat a certain point spread. . . . This information was utilized by Pradella when he adjusted the line in a discussion with Torino at 11:39 a.m. on the same day . . . ." The expert's opinions regarding Stone's involvement in the larger gambling operation do not suffer from the alleged weaknesses in his opinions with respect to appellant Bruno's participation, *see* note 7, *supra*; for the most part they are clearly based on facts apparent in the Stipulation.[9] Evidence of the October 22, 1974, discussion between Stone and Sacco supports the conclusion that Stone was a bookmaker and was associated with Scibelli. The "Expert Analysis" of the conversation between Stone and Pradella indicates that Stone was passing Pradella important line information, and evidence presented elsewhere in the Stipulation provides a basis for Agent Harker's conclusion that Pradella used this information to adjust the line at the office. This evidence was sufficient to convict Stone of the substantive offense of conducting "an illegal gambling business" and of conspiracy to conduct such a business. *See United States* v. *DiMuro, supra*, 540 F.2d at 508.

Affirmed.

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[9] Only the expert's conclusion that Stone called Pradella "at the request of Scibelli" and acted "as the conduit of sports wagering information to Pradella" is arguably unsupported by evidence in the Stipulation, and we therefore do not rely on this part of the expert's opinion in considering whether sufficient evidence exists connecting Stone to the larger operation. *See* note 7, *supra*.

APPENDIX B

TITLE 18

CRIMES AND CRIMINAL PROCEDURE

Chapter 1 General Provisions

SECTION 2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

Chapter 19. Conspiracy

SECTION 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment for such misdemeanor.

June 25, 1948, c. 645, 62 Stat. 701.

Chapter 95. Racketeering

SECTION 1955. PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more consecutive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

Chapter 119. Wire Interception and Interception of Oral Communications

Section 2518. Procedure for Interceptions of Wire or Oral Communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing

probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilitie from which, or the place where, the wire or oral

communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication

for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that —

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for

by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the

interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such

motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

Supreme Court, U. S.
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MAY 23 1977
MICHAEL RODAK, JR., CLERK

No. 76-1212

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANCESCO SCIBELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 222.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the applications for orders authorizing electronic surveillance sufficiently established that other investigative procedures were inadequate.

STATEMENT

Following a non-jury trial in the United States District Court for the District of Massachusetts, petitioner and eight co-defendants were convicted of operating an illegal gambling business in violation of 18 U.S.C. 1955, and of conspiring to commit that offense in violation of 18 U.S.C. 371. Petitioner was sentenced to 18 months' imprisonment, subject to the parole provisions of 18 U.S.C. 4208(a)(2), and a fine of $7,500. The court of appeals affirmed (Pet. App. A).

The facts are set out in the opinion of the court of appeals (Pet. App. 10-14). A six-month investigation, commencing in June 1974, preceded this prosecution. During that investigation, the government derived certain evidence from three periods of court-authorized electronic surveillance. The order authorizing the first surveillance was issued on October 15, 1974, pursuant to an application by the government supported by a 78-page affidavit of Agent Alan G. Ringgold of the Federal Bureau of Investigation. It authorized electronic surveillance of a telephone in a bar, the Gaslight Room, for 21 days.[1] Two other orders, issued on November 14, 1974, and December 10, 1974, authorized the surveillance of six additional telephone numbers for 21 and 20 days, respectively.[2] The affidavit supporting each application incorporated by reference all preceding affidavits, represented that normal investigating procedures

[1]The order also authorized electronic surveillance of a telephone at another business establishment and the use of a listening device at the Gaslight Room (C.A. App. 59). Although such a device was installed, no useful evidence was obtained through it (Pet. App. 13, 19).

[2]We are lodging copies of the affidavits supporting the applications for the three orders with the Clerk of this Court. They are identified as EBD 74-224, EBD 74-275 and EBD 74-295.

had failed, and described why such efforts were unlikely to succeed in light of the particular circumstances of this investigation (Pet. App. 12-14, 17-19).[3]

The evidence derived from these three orders was subject to a motion to suppress, based in part on the ground that the government failed to comply with 18 U.S.C. 2518(1)(c), which requires the government in making application for an electronic surveillance order to establish that other investigative procedures are inadequate. After a hearing, the district court denied petitioner's motion to suppress evidence. Petitioner waived a jury trial and entered into a stipulation that, considered together with the transcripts of the electronic surveillance, show that petitioner and his co-defendants conducted an extensive gambling operation, in large part over telephones (Pet. App. 10-11).

ARGUMENT

Petitioner asserts (Pet. 4-7) that the affidavits in support of the government's applications for orders authorizing electronic interception failed to show that "other investigative procedures have been tried and

[3]These circumstances included the fact that the informants were unwilling to testify for fear of their personal safety, and that the one informant who had testified before a grand jury under a grant of immunity had not given useful evidence (Pet. App. 12-13). While physical surveillance inside the Gaslight Room had shown a suspicious pattern of conduct and association, its continuation risked disclosure of the investigation and was unlikely to produce sufficient proof for conviction, since "the subjects continually utilize the table in the right rear area of the lounge on a consistent basis in order to hold subdued conversation" (Pet. App. 13). Moreover, the same subjects frequented a private back room of the bar (EBD 74-224 pp. 71-72). The affidavit supporting the second order reported that the listening device installed in the Gaslight Room had not been useful, due to the high extraneous noise level, and contained facts showing that the subjects were becoming extremely sensitive to scrutiny (Pet. App. 13-14; EBD 74-275 pp. 34a-b, 37-38.

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failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c).

We have recently discussed the requirements of Section 2518(1)(c) in our briefs in opposition to certiorari in *Scully* v. *United States*, No. 76-5918, certiorari denied, April 18, 1977; *Anderson* v. *United States*, No. 75-500, certiorari denied, February 28, 1977; *Feldman* v. *United States*, No. 76-113, certiorari denied, November 8, 1976; *Pezzino* v. *United States*, No. 75-6651, certiorari denied, October 4, 1976; *Steinberg* v. *United States*, No. 75-1040, certiorari denied, 425 U.S. 971; *Green* v. *United States*, No. 75-962, certiorari denied, 425 U.S. 950; and *Lawson* v. *United States*, No. 75-659, certiorari denied, 424 U.S. 927.[4] In those discussions we noted that the requirements of Section 2518(1)(c) are satisfied when the affidavit, read in a practical and commonsense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), shows a sufficient factual basis from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the activities under investigation, or is necessary to ascertain the full scope of their activities and identify the participants. See, *e.g.*, *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Steinberg*, 525 F. 2d 1126, 1129-1131 (C.A. 2), certiorari denied, 425 U.S. 971; *United States* v. *De La Fuente*, 548 F. 2d 528, 537-538 (C.A. 5); *United States* v. *Jackson*, 549 F. 2d 517, 536-537 (C.A. 8); *United States* v. *Landmesser*, C.A. 6, No. 76-1540, decided April 18, 1977.

[4]We are sending petitioner's counsel copies of our briefs in *Scully* and *Green*.

Both courts below correctly found that the affidavits here provided such a factual basis (Pet. App. 16-19). The affidavit of Agent Ringgold accompanying the first application for an intercept order clearly indicates that, after several months of investigation, the informants who were familiar with the gambling operation and had provided useful information were afraid to testify and the one informant who had testified under a grant of immunity was unable or unwilling to give useful information. The affidavit also detailed the information derived from physical surveillance, explaining that further physical surveillance would provide only cumulative evidence, insufficient to sustain a conviction, because of the described physical layout of the premises where most of the personal transactions between the subjects took place. The second affidavit incorporated the initial affidavit and alleged in addition that the listening device was not providing sufficient information because of extraneous noise, that several targets of the investigation were becoming suspicious of law enforcement scrutiny,[5] and that the informants continued to refuse to testify. The final affidavit, incorporating by reference the other two, concluded that additional authorization was necessary in order to identify certain individuals, known to be involved in the scheme, and to monitor the new location of the operation. As the court of appeals found (Pet. App. 19): "Considering together all factors mentioned in each affidavit, each was sufficient for the district court to find it met the requirement of section

[5]The operation did subsequently change its telephone number.

2518(1)(c)."[6] Further review of this essentially factual determination is unwarranted.

Petitioner nevertheless contends (Pet. 7-8) that this Court should resolve the conflict between this decision and that of a panel of the Ninth Circuit in *United States* v. *Kalustian*, 529 F. 2d 585. We agree that the *Kalustian* panel appears to have interpreted 2518(1)(c) to require greater specificity in the supporting affidavits than other panels of the Ninth Circuit or panels of other circuits.[7] The divergence is not, however, as serious as petitioner suggests. In the first place, the standard petitioner quotes as representing the Ninth Circuit's current position (Pet. 7-8) was excised from the *Kalustian* opinion when it was modified on December 11, 1975, and therefore evidently does not now represent the views even of that panel. See 529 F. 2d at 590.

Moreover, another panel of the Ninth Circuit has recently recognized that the circuit's decisions in this area "often lead to results difficult to harmonize" and has tried "to promulgate a manageable standard by which to judge affidavits under 2518(1)(c)." *United States* v. *Spagnoulo*, 549 F. 2d 705, 709-710. The standard that it adopted is that the "affidavit, read in its entirety, must give a factual basis

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[6]The court of appeals correctly concluded (Pet. App. 18 n. 5) that it was not necessary for the government to show that the informants had been offered immunity, protective custody, or a new identity if they would testify. To the extent that refusal to testify was based on fear, immunity would have been ineffective—indeed, the affidavits did show that it had been tried without success in one instance. In any event, as the court of appeals noted, Section 2518(1)(c) does not mean that electronic surveillance can be used only after "every other imaginable method of investigation has been unsuccessfully attempted." *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. Accord, *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913.

[7]See cases cited, *supra*, p. 4.

sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. * * * An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with 2518(1)(c). *Kalustian* teaches no more than that" (549 F.2d at 710). Tested by that standard, the instant affidavits are clearly sufficient since they contain ample particular facts to show the inadequacy of normal investigative procedures in the specific investigation here involved. Accordingly, even assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere,[8] this case does not directly present that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Since no other court of appeals has followed *Kalustian*, and since efforts are presently being made to prepare affidavits so that they conform to the stringent *Kalustian* standards, we have concluded that it is not necessary for this Court to review the decisions in which various panels of the Ninth Circuit have suppressed evidence on the authority of *Kalustian*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902. Nor do we believe that this essentially intra-circuit conflict requires review by this Court of cases in which the generally prevailing standard is utilized. See, *e.g.*, *Feldman* v. *United States*, *supra*.